Supreme Court, U.S.
FILED

No._____

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# In The Supreme Court of the United States

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**TERRY TYRONE MOORE,**

*Petitioner,*

**v.**

**COMMONWEALTH OF VIRGINIA,**

*Respondent.*

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**On Petition for Writ of Certiorari to the Supreme Court of Virginia**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Circuit Court of the City of Hampton, Virginia, erred by preventing the Petitioner from cross-examining the alleged victim of the offenses of conviction, i.e. attempted maiming, attempted robbery, conspiracy to commit robbery and use of firearms, about the witness' bias arising from the witness' having entered into a federal plea agreement which resulted in the dismissal of numerous federal charges in exchange, in part, for his testifying against the Petitioner in violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and further whether the Court of Appeals of Virginia erroneously concluded that, although the trial court improperly excluded such evidence, that the error was harmless beyond a reasonable doubt.

## PARTIES TO THE PROCEEDINGS

The Petitioner was the sole Defendant-Appellant in the proceeding in the Supreme Court of Virginia. The Commonwealth of Virginia was the Plaintiff-Appellee.

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## OPINIONS BELOW

The decision of the Supreme Court of Virginia denying the Petitioner's petition for appeal on January 4, 2005 and the subsequent denial of his petition for rehearing of said petition on March 16, 2005 are set forth in memorandum orders contained in Appendices A and B to this Petition. The opinion of the Virginia Court of Appeals is contained in a unpublished opinion, *Terry Tyrone Moore v. Commonwealth*, 04 Vap UNP 0981031(Record No. 0981-03-1 decided: July 13, 2004) and appears in Appendix C. The final judgment order of the Circuit Court of Hampton, entered on January 29, 2004, appears in Appendix D to this Petition.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution is set forth in Appendix E.

Section One of the Fourteenth Amendment to the United States Constitution is set forth in Appendix F.

## STATEMENT OF THE CASE

Original jurisdiction in this case was before the Circuit Court of the City of Hampton, Virginia. The criminal indictment before said Court charged that Petitioner on or about the 21st day of May 1996 unlawfully and feloniously did attempt to shoot, stab, cut, wound or otherwise cause bodily injury to Martin Jennings with intent to maim, disfigure, disable or kill, Virginia Code Sections 18.2-51 and 18.2-26, a felony; on or about the 21st day of May 1996 unlawfully and feloniously use a firearm or display such weapon in a threatening manner while committing the attempted maiming of Martin Jennings, Virginia Code Section 18.2-53.1, a felony; on or about the 21st day of May 1996 unlawfully and feloniously did attempt to shoot, stab, cut, wound or otherwise cause bodily injury to Michael Weatherford with intent to maim, disfigure, disable or kill, Virginia Code Sections 18.2-51 and 18.2-26, a felony; on or about the 21st day of May 1996 unlawfully and feloniously use a firearm or display such weapon in a threatening manner while committing the attempted maiming of Michael Weatherford, Virginia Code Section 18.2-53.1, a felony; on or about the 21st day of May 1996 unlawfully and feloniously attempt to rob Martin Jennings by assault or by the threat or presentation of a firearm, Virginia Code Sections 18.2-58 and 18.2-26, a felony; on or about 21st day of May 1996 unlawfully and feloniously use a firearm or display such weapon in a threatening manner while committing the attempted robbery of Martin Jennings, Virginia Code Section 18.2-53.1, a felony; between January 1, 1995 and December 31, 1997 unlawfully and feloniously conspire, confederate or combine with others to commit felonies, to wit: robberies, Virginia Code Section 18.2-22 and 18.2 58, a felony.

Petitioner pled not guilty, was convicted by a jury

of conspiracy, use of a firearm in attempted maiming, attempted robbery, use of a firearm in the attempted robbery and in the attempted maiming. The jury recommended punishment, which included confinement in a total amount of a term of 23 years and fines of $102,500.00. After the preparation of a presentence report, a sentencing hearing was held on January 29, 2003. The Circuit Court imposed the sentence recommended by the jury and a period of three (3) years supervised release.

Petitioner pursued an appeal to the Court of Appeals of Virginia by discretionary petition for appeal. The Court of Appeals granted the petition for appeal in part and denied it in part. An appeal was awarded regarding the issue raised in this petition, that is: whether the Petitioner had been denied his sixth amendment right to confrontation by the trial court's denial of his ability to fully cross examine an essential Commonwealth witness regarding the full terms of the witness's pretrial agreement with the United States.

On July 13, 2004, the Court of Appeals of Virginia affirmed in an unpublished opinion, *Moore v. Commonwealth*, 04 Vap UNP 0981031(Record No. 0981-03-1 decided: July 13, 2004). The opinion held that the trial court erred in denying Petitioner the opportunity to fully develop the terms of the witness' plea agreement and the potential bias created thereby, however the Court concluded that the error was harmless. Thereafter, the Petitioner sought a further review by discretionary petition for appeal to the Virginia Supreme Court of this and the other issues denied by the Court of Appeals. The Supreme Court of Virginia denied the Petitioner's petition for appeal on January 4, 2005 and a subsequent petition for rehearing on March 16, 2005.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted as to the question because Petitioner's Sixth Amendment confrontation rights were violated by the trial court's denial of his ability to fully explore the terms and conditions of the plea agreement of the key witness against him. The holding of the Court of Appeals of Virginia, concluding that the Petitioner's Sixth Amendment rights where violated, but that such violation was harmless, was clearly erroneous and contrary to the rulings of this honorable Court as to the legal standards for harmless error as applied to the facts of this case.

The Commonwealth's case as to each of the offenses of conviction was predicated on the testimony of three witnesses. The conspiracy count alleging an on-going agreement to rob drug dealers in the Hampton area over a two-year period was based solely on the immunized testimony of an alleged accomplice, Keith Davis, as corroborated by the facts of the alleged events on May 21, 1996. Davis claimed to have been involved in a series of robberies or attempted robberies with the Petitioner between 1995 and 1997. He testified about the events of May 21, 1996, claiming to have been present and to have been directly involved with the shooting and attempted robbery that supported the remaining indictments. Other than the testimony of the alleged "victims" of the events on May 21, 1996, there was no evidence to support Davis' claims concerning his alleged activities with the Petitioner. Davis testified under a transactional grant of immunity from both the United States and the Commonwealth of Virginia related to all the matters to which he testified. Davis acknowledged that he had made earlier statements to detectives concerning the events of May 21, 1996, which conflicted with his trial testimony. This was, in fact, subsequently verified by the testimony of a police detective involved in developing the evidence in the

case. Not only did Davis' testimony conflict with his earlier version of events, it materially conflicted with the version related by the other two witnesses who were supposedly the victims of the offenses on May 21, 1996.

The purported primary victim of the offenses on May 21, 1996, Martin Jennings, was a self-acknowledged drug dealer who was testifying under a federal plea agreement, which obligated him to testify on behalf of the government as well as providing him with immunity as to the contents of his testimony. Jennings was shown to have lied to the police, shortly after the fact, concerning material facts surrounding the purported shoot-out on May 21, 1996, and thereafter had refused to cooperate in an earlier prosecution of the Petitioner. Only after he had been convicted by his guilty plea to a federal drug conspiracy pursuant to a plea agreement, did Jennings resurrect the claim of his attempted robbery by the Petitioner six years earlier. Jennings agreement provided for the dismissal of numerous additional offenses and also provided an avenue to reduce an eighteen-year sentence, after the fact, based on his cooperation including testifying as in the instant case. Jennings' testimony conflicted both with his own earlier statements as well as the testimony of the other two "eyewitnesses." Further by his own acknowledgment, Jennings bore an animus for the Petitioner for prior run-ins unrelated to the alleged shooting on May 21, 1996.

The third Commonwealth "eyewitness," Michael Weatherford, was a close friend of Jennings who was involved with Jennings' drug distribution. Although there was no indication that he had been provided a formal grant of immunity, his testimony indicated that he was Jennings' associate and that he was not being prosecuted by the state or federal authorities. Weatherford acknowledged his direct involvement with Jennings' illicit activities and that he had lied

to police to cover-up for Jennings early in the investigation of these alleged offenses. His testimony was significantly different in material detail concerning the alleged events of May 21, 1996 from both that of Davis and Jennings.

The contention of the Commonwealth concerning the events of May 21, 1996, was that the Petitioner and Davis went to the apartment of Jennings, where Petitioner saw Jennings outside and shot at him, and Jennings thereafter returned fire with his gun. Petitioner testified on his behalf at trial, denying all the allegations and presenting evidence of an alibi for the events of May 21, 1996, which was corroborated by the testimony of his girlfriend and his mother. Jennings was the Commonwealth's primary witness as to the events of May 21, 1996. On direct examination, the Commonwealth elicited from Jennings that he had been indicted and convicted of a federal offense of a conspiracy to possess and distribute approximately 1.7 kilograms of crack cocaine for which he was presently incarcerated. On cross-examination, Petitioner offered Jennings' federal plea agreement as an exhibit, which was admitted without objection. Although the trial court permitted the defense to explore Jennings' duty to cooperate with authorities as part of his undertaking with federal authorities, the court denied him the ability to go into the full benefit received by Jennings' as a result of the agreement. Specifically Petitioner was denied the opportunity to explore the number and gravity of other offenses of which Jennings was originally charged but which were dropped as part of his negotiated plea.

The Virginia Court of Appeals and the Virginia Supreme Court failed to accord proper weight to Petitioner's Sixth Amendment right "to be confronted with the witnesses against him." That right is incorporated in the Fourteenth Amendment and therefore available in state proceedings, *Pointer v. Texas*, 380 U.S. 400 (1965), and it includes the right

to conduct reasonable cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974). Subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness." *Id.*, at 316. This honorable Court has emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.*, at 316-317, (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). "(A) criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (citing *Davis*, 415 U.S. *at* 318).

The federal courts have long recognized that a trial judge's traditional discretion to control the limits of cross-examination cannot be exercised until "the constitutionally required threshold level of inquiry has been afforded the defendant." *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir. 1982). Moreover, any exercise of discretion once that threshold is reached must be informed by "the utmost caution and solicitude for the defendant's Sixth Amendment rights." *United States v. Houghton*, 554 F.2d 1219, 1225 (1st Cir. 1977, cert. denied, 434 U.S. 851 (1977). "Especially where the witness is an accomplice of the defendant or may have some substantial other reason to cooperate with the government, the defendant should be permitted wide latitude in the search for the witness' bias." *Tracey*, 675 F.2d at 438.

Likewise the Virginia appellate courts have also long been mindful of the Constitutional dimension of denying a criminal defendant his Sixth Amendment right of effective cross examination. In a case involving the extant issue in this petition, the Virginia Court of Appeals noted:

> Where the purpose of the inquiry is to impeach a witness' veracity, cross-examination concerning a witness' prior convictions is limited to prior felony convictions and convictions for misdemeanors involving moral turpitude. However, it is error to apply the principles governing cross-examination for purposes of impeaching a witness' veracity to limit cross-examination designed to demonstrate a witness' bias or motive to testify. ("An accused has a right to cross-examine prosecution witnesses to show bias or motivation and that right, when not abused, is absolute. The right emanates from the constitutional right to confront one's accusers.").

*Scott v. Commonwealth,* 25 Va. App. 36, 41-43, 486 S.E.2d 120, ___ (1997) (internal citations omitted). Indeed in the instant case the Court of Appeals noted:

> (t)he fact that a witness "received lenient sentences in exchange for his testimony" against a defendant is *"'highly relevant'"*; it "lay[s] the predicate for an inference that the testimony . . . was biased and unreliable because induced by considerations of self-interest.'" Evidence relating to a point, such

> as bias, properly at issue in the case is relevant and, therefore, admissible "if it has *any logical tendency, however slight*, to establish a fact at issue in the case."

*Moore,* Appendix C at pgs. C-2 - C-3 (internal citations omitted).

In applying those principles to the specific facts of this case, the Court of Appeals correctly analyzed the facts, observing "Jennings had two potential motives under the plea agreement for testifying falsely against appellant." *I d.* at pg. C-3. The first was by the specific terms of his federal plea agreement requiring testimony " not limited merely to federal proceedings," under which "Jennings had already received a significant sentence reduction.... and under which he "could reasonably... have assumed " a further sentence reduction if he gave testimony that incriminated appellant, without regard for whether that testimony was true." *I d.* "Second, Jennings could have feared that if he did not give testimony incriminating appellant at the request of the federal government, whether or not that testimony was true, the federal government would seek to void the plea agreement and to prosecute him for whatever charges had been dismissed pursuant to the agreement when Jennings pleaded guilty...." *Id.* at pg. C-4. This view of the evidence led the Court to correctly conclude that:

> (t)hus, ... the nature of the charges for which Jennings thought the federal government might still attempt to prosecute him was relevant to show bias against appellant including a motive to fabricate. Based on these principles, we hold the trial court erred in refusing to allow appellant to question Jennings about the nature of the

> federal charges dismissed in exchange for his guilty plea on the conspiracy charge.

*Id.*

The Court then proceeded to do a harmless error analysis, which erroneously concluded that the error was harmless beyond a reasonable doubt. *Id.* at pgs. C-5 - C-8. (citing, *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986).

In *Van Arsdall,* this honorable court did hold that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* v. *California*, 386 U.S. 18 (1967) harmless-error analysis." *Id.* at 684. The Court stated:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

*Id.*

The Court of Appeals of Virginia, scrutinized the evidence of record saying "to determine whether the trial error was harmless, our analysis turns not on the evidence excluded, ...but on the evidence in the record... which was not fully subject to cross-examination." *Moore*, Appendix C at pg. C-5. The Court of Appeals analogized its review "to harmless error review in cases of improperly admitted evidence, where the error is held harmless if the record contains "overwhelming" evidence of guilt. *Id.* According to the Court of Appeals it applied the five prong test annunciated by this honorable Court in *Van Arsdall,* in evaluating whether the error was indeed harmless beyond a reasonable doubt. *Moore*, Appendix C at pg. C-5.

In its analysis, the Court of Appeals concluded that the test was satisfied in that although Jennings' " testimony was not unimportant," it was in the view of the Court of Appeals, corroborated by other evidence and there was "no evidence to refute it." *Id.* at pg. C-6. Secondly in Petitioner's case the trial court had permitted the jury to be "made aware that the witness had a plea agreement" and Petitioner's counsel had been permitted to cross examine Jennings about numerous other factors which established that witness' bias as well as other factors that significantly detracted from his credibility. *Id.* at pg. C-7.

Since the Virginia Supreme Court denied Petitioner's petition for appeal from the Court of Appeals without comment, it must be concluded that it accepted the harmless error analysis of the lower court as being correct. However, the Court of Appeals' analysis of the evidence in this matter was materially flawed requiring this honorable Court to intervene to correct a clear injustice. Jennings' testimony was central, indeed crucial, to the prosecution's case. Contrary to the Court of Appeals' assertion that his testimony was unrefuted, his story

was directly contradicted by the testimony of the Petitioner as well as the Petitioner's mother and girlfriend. The corroboration for Jennings' testimony was only from the testimony of Weatherford and Davis. Weatherford's impartiality was impugned by his relationship with Jennings as well as his previous contradictory statements. Davis, who if believed was the Petitioner's accomplice, was relying on government assurances of immunity from prosecution and his testimony contradicted Jennings' and Weatherford's version of events of May 21, 1996. Accordingly, the Commonwealth's case against Petitioner was far from overwhelming. The best the Court of Appeals could muster in declaring the error harmless was that the "overall case was strong." *Id.* at pg. C-6. When viewed objectively even that is hardly an accurate view of the evidence. Although the defense was permitted to explore several grounds of bias on the part of Jennings as well as other factors which materially detracted from his credibility, the possible impact on the trier of fact of the continued need for Jennings to portray the Petitioner as culpable for the events of May 21, 1996, to avoid further federal prosecution can not be overstated. In sum, considering the relevant *Van Arsdall* factors within the context of this case, it is impossible to conclude "beyond a reasonable doubt" that the restriction on Petitioner's right to confrontation was harmless.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia in this matter.

Respectfully submitted,
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No._____

# In The Supreme Court of the United States

## TERRY TYRONE MOORE,

*Petitioner,*

**v.**

## COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Virginia**

## APPENDIX

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## APPENDIX A

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 16th day of March 2005.

Terry Tyrone Moore, Appellant,

against Record No. 041896
Court of Appeals No. 0981-O3-1

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 4th day of January, 2005, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: original order signed by a deputy clerk of Supreme Court of Virginia at the direction of the Court

Deputy Clerk

## APPENDIX B

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 4th day of January, 2005.

Terry Tyrone Moore Appellant,

against Record No. 041896
Court of Appeals No. 0981-03-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste :

Patricia H. Krueger, Clerk
By: original order signed by a deputy clerk of Supreme Court of Virginia at the direction of the Court
Deputy Clerk

## APPENDIX C

*Moore v. Commonwealth*, 04 Vap UNP 0981031 (2004)

UNPUBLISHED
IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT CHESAPEAKE, VIRGINIA

**TERRY TYRONE MOORE**
**v.**
**COMMONWEALTH OF VIRGINIA**

Record No. 0981-03-1
Decided: July 13, 2004

Present: Judges Benton, Elder and Frank

FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON, William C. Andrews, III, Judge

*Affirmed.*

COUNSEL

S. H. Weaver, Sr. (Weaver Law Offices, on brief), for appellant.

Kathleen B. Martin, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

MEMORANDUM OPINION* BY JUDGE LARRY G. ELDER:

Terry Tyrone Moore (appellant) appeals from his jury trial convictions for attempted maiming, attempted robbery, conspiracy and two counts of use of a firearm. On appeal, he contends the trial court erroneously prevented him from cross-examining one of the victims about potential bias stemming from his entering a federal plea agreement that resulted in the dismissal of numerous federal charges in exchange for his testifying against appellant. We hold this limitation on cross-examination was error. Nevertheless, we affirm appellant's conviction because we hold the exclusion of the evidence was harmless.

Where a defendant seeks to cross-examine a witness

> to impeach [the] witness' veracity, cross-examination . . . is limited to prior felony convictions and convictions for misdemeanors involving moral turpitude. However, it is error to apply the principles governing cross-examination for purposes of impeaching a witness' veracity to limit cross-examination designed to demonstrate a witness' bias or motive to testify.

*Scott v. Commonwealth*, 25 Va. App. 36, 41, 486 S.E.2d 120, 122 (1997) (citations omitted). "An accused has a right to cross-examine prosecution witnesses to show bias or motivation and that right, when not abused, is absolute. The right emanates from the constitutional right to confront one's accusers." *Brown v. Commonwealth*, 246 Va. 460, 463-64, 437 S.E.2d 563, 564-65 (1993).

The fact that a witness "received lenient sentences in exchange for his testimony" against a defendant is " '*highly relevant*' "; it "lay[s] the predicate for an inference that the

testimony . . . was biased and unreliable because induced by considerations of self-interest.'" *Shanklin v. Commonwealth*, 222 Va. 862, 864, 284 S.E.2d 611, 612 (1981) (quoting *Whittaker v. Commonwealth*, 217 Va. 966, 967, 234 S.E.2d 79, 81 (1977) (emphasis added in *Shanklin)).* Evidence relating to a point, such as bias, properly at issue in the case is relevant and, therefore, admissible "if it has *any logical tendency, however slight*, to establish a fact at issue in the case." *Ragland v. Commonwealth*, 16 Va. App. 913, 918, 434 S.E.2d 675, 678 (1993) (emphasis added); *see also* Charles E. Friend, *The Law of Evidence in Virginia* § 11-1 (5th ed. 1999 & Supp. 2001).

Appellant's case is not technically one in which a witness received a lenient sentence in exchange for his testimony against appellant. Witness Martin Jennings's situation involved a plea to one crime in exchange for the federal government's agreement not to prosecute other charged crimes. Further, Jennings entered into this agreement with the federal government several years before being asked to testify against appellant in an unrelated prosecution brought not by the federal government but by the state.

Nevertheless, Jennings had two potential motives under the plea agreement for testifying falsely against appellant. First, the federal plea agreement required Jennings "to testify truthfully and completely at grand juries, trials or other proceedings" and was not limited merely to federal proceedings. Jennings had already received a significant sentence reduction, from eighteen years to seven years, for cooperating with the federal prosecutor pursuant to the agreement in an unrelated case involving conspiracy to distribute "17 point something keys of crack" cocaine. When a representative of the federal government came to talk to

Jennings in August 2001 about his 1996 altercation with appellant, Jennings could reasonably have assumed he would be eligible for an additional sentence reduction if he gave testimony that incriminated appellant, without regard for whether that testimony was true.

Second, Jennings could have feared that if he did not give testimony incriminating appellant at the request of the federal government, whether or not that testimony was true, the federal government would seek to void the plea agreement and to prosecute him for whatever charges had been dismissed pursuant to the agreement when Jennings pleaded guilty to the charge of conspiracy to distribute. Jennings testified, in fact, that when "the federal government, [Detective Thurman] Clark or whoever," came to see him in August of 2001, Jennings had already received one sentence reduction. Jennings testified he thought that sentence reduction was "the end of it" and that "[Detective] Clark or whoever . . . was just trying to use me." Thus, we hold that the nature of the charges for which Jennings thought the federal government might still attempt to prosecute him was relevant to show bias against appellant including a motive to fabricate.

Based on these principles, we hold the trial court erred in refusing to allow appellant to question Jennings about the nature of the federal charges dismissed in exchange for his guilty plea on the conspiracy charge.

Although the court erred in restricting appellant's ability to cross-examine Jennings regarding possible bias, that error does not require reversal if we determine the error was harmless. *See Lavinder v. Commonwealth*, 12 Va. App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (*en banc*). "'The

constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to . . . harmless-error analysis.'" *Maynard v. Commonwealth*, 11 Va. App. 437, 448, 399 S.E.2d 635, 641 (1990) (*en banc*) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986)). "'The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, [we] might nonetheless say that the error was harmless beyond a reasonable doubt.'" *Id.* (quoting *Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438); *see also Shanklin*, 222 Va. at 864-65, 284 S.E.2d at 612-13; *Scott*, 25 Va. App. at 41-45, 486 S.E.2d at 122-24; *Williams v. Commonwealth*, 4 Va. App. 53, 78, 354 S.E.2d 79, 93 (1987). "Thus, to determine whether the trial error was harmless, our analysis turns not on the evidence excluded . . . but on the evidence in the record, *viz.*, [the witness'] testimony, which was not fully subject to cross-examination." *Scott*, 25 Va. App. at 42, 486 S.E.2d at 123. Other important factors are "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438.

The facts of appellant's case relevant to the harmless error analysis are similar to those in *Williams*, 4 Va. App. 53, 354 S.E.2d 79. In *Williams*, we held the court did not abuse its discretion in limiting cross-examination but that, even if it had committed error, that error was harmless. Although the testimony of Frazier, the witness as to whom cross-

examination was limited in *Williams*, "was not unimportant," "the Commonwealth's overall case was strong." "[T]here was a good deal of evidence which tended to corroborate [Frazier's testimony]" — including the defendant's statements to a detective and the drugs found on his person — "and no evidence to refute [Frazier's testimony]." *Williams*, 4 Va. App. at 79, 354 S.E.2d at 94. Further, the only evidence attacking Frazier's credibility came from his sister, who had been dating the defendant. *Id.* Finally,

> Williams was not deprived of all right to cross-examine Frazier. Defense counsel cross-examined [him] during the trial and confirmed the fact that drug charges against him were still pending. Even without the further cross-examination sought, counsel was able to argue to the jury that [the witness] should not be believed because he was attempting to "save his own skin" and that he was "motivated to put the blame on someone else." Counsel also invited the jury to "wonder how the Commonwealth got [the witness] to come to court and testify [since] [h]is case hasn't come up yet." It is evident from these facts that Williams was not deprived of the opportunity to argue that [the witness] had a motive to provide favorable testimony for the Commonwealth.

*Id.*

In appellant's case, like in *Williams*, "the Commonwealth's overall case was strong. [The witness'] testimony was not unimportant; however, there was a good deal of evidence which tended to corroborate it and no evidence to refute it." *Id.* Michael Weatherford, Jennings's companion at the time of the shooting, corroborated Jennings's testimony that the

shooting occurred and that appellant was the shooter. Keith Davis, appellant's companion at the time of the shooting, testified that he and appellant planned to rob Jennings, who they knew was a drug dealer, and that they had gone to Jennings's apartment to commit the robbery. Davis also testified that appellant shot at Jennings first and that Jennings merely returned appellant's fire.

Further, in appellant's case, the evidence of harmlessness was even stronger than in *Williams*. In *Williams*, the jury was not made aware that the witness had a plea agreement with the Commonwealth. *Id.* at 79-80, 354 S.E.2d at 94. In appellant's case, by contrast, the jury was informed of the existence of the plea agreement, just not the precise nature of the charges that were dismissed in exchange for the agreement. Appellant's counsel cross-examined Jennings about other crimes of violence which he had been involved in but not charged for, and he obtained Jennings's admission that he had been a drug dealer who had originally lied to police about his own level of involvement in the shooting and drug dealing before he was indicted and chose to cooperate with the authorities. Finally, counsel was able to argue to the jury as follows:

> The prosecution would lead you to believe that these [witnesses, including Jennings,] had nothing to gain, the ones that came in here. A young fellow, not so young now, gets 216 months. Through telling the government something, he's gotten that reduced to 84. In the agreement, . . . it says that he's not going to be prosecuted for any crimes of violence.
>
> Incidentally, when I asked Mr. Jennings about whether or not he thought shooting at somebody was

> a crime of violence, he says, "It's not a crime of violence unless you hit them." And he told you that he had been shooting at people before. That happens on the street.
>
> The prosecution says they are concerned about the street violence. If they were so concerned about the street violence, here's a man, Mr. Jennings, . . . who told them, "I do a lot of that stuff," what do they do for him? They say, "All right. We're not going to prosecute you for any of that stuff you did. You just come down and do a little testifying. We're going to let you go."

*See Shanklin*, 222 Va. at 864-65, 284 S.E.2d at 612-13 (holding even absent testimony of witness allegedly biased due to existence of plea bargain for undisclosed sentence, "there was sufficient evidence to support a conviction" because testimony of challenged witness also contained components favorable to defendant and, despite non-disclosure of sentence, "defendant's counsel ably and fully argued to the jury [the witness'] bias"); *cf. Scott*, 25 Va. App. at 43-45, 486 S.E.2d at 123-24 (holding any error in restricting cross-examination was harmless beyond reasonable doubt because "facts established by testimony of [Commonwealth's other] witnesses . . ., standing alone, provided overwhelming evidence of [Scott's] guilt," testimony at issue "was relatively insignificant to the Commonwealth's case," and "notwithstanding the trial court's exclusion of misdemeanor offenses not involving moral turpitude as evidence related to [witness'] bias, . . . [Scott] was afforded the opportunity to cross-examine [the witness] extensively" about motive to lie "to avoid a long sentence in . . . three pending cases").

For these reasons, we hold the trial court's limitation on appellant's cross-examination was error. Nevertheless, we affirm appellant's conviction because we hold the exclusion of the evidence was harmless.

*Affirmed.*

FOOTNOTES

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

## APPENDIX D

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON**

DATE: January 29,2003
JUDGE: William C. Andrews, III

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 01-1152-00, -01, -04, -05 & -06

TERRY TYRONE MOORE, DEFENDANT

DATE OF BIRTH: SEX: Male
SSN/OL NO.: RACE: Black
ADDRESS: 8 Somerset Lane, Hampton., VA

| OFFENSE: | CODE SECTION: |
|---|---|
| Attempted maiming (F) | 18.2-51 & 18.2-26 |
| Use of firearm (F) | 18.2-53:1 |
| Attempted robbery (F) | 18.2-58 & 18.2-26 |
| Use of firearm (F) | 18.2-53.1 |
| Conspire to commit felonies (F) | 18.2-22 & 18.2-58 |

OFFENSE DATE:
5-21-96
5-21-96
5-21-96
5-21-96
between 1-1-95 & 12-31-97

## SENTENCING ORDER

Attorney for the Commonwealth: James P. Gochenour
Attorney for the Defendant: Sterling Weaver
Court Reporter: Michelle D. Bradley

The defendant, who was led to the bar in the custody of the jailor of this Court, was present and represented by the retained attorney named above.

On October 10, 2002, the defendant was found GUILTY of the above offense.

The presentence report was received by the Court in the manner prescribed by law, and ordered filed.

Pursuant to the provisions of §19.2-298.01, the Court has considered the applicable discretionary guidelines worksheets, which are ordered filed as a part of the record in this case.

Before pronouncing sentence, the Court inquired if the defendant desued to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCED** the defendant to:

Incarceration with the Virginia Department of Corrections for a term. of seven (7) years and imposes a fine of $100,000.00 for the offense of Attempted maiming, three (3) years for the offense of Use of firearm, seven (7) years for the offense of Attempted robbery, five (5) years for the

offense of Use of firearm, twelve (12) months and imposes a fine of $2,500.00 for the offense of Conspire to commit felonies.

This sentence shall run consecutively with any other sentences imposed.

**Post release supervised probation.** The defendant is placed on probation under the supervision of a Probation Officer of this Court for three (3) years from the date of his release from confinement, whichever occurs last, and the defendant shall comply with the probation rules of this Court provided by the Probation Officer and with all additional requirements set by the Probation Officer. Probation shall included substance abuse counseling and/or testing as prescribed by the Probation Officer.

**Costs.** The defendant shall pay Court costs of this proceeding within two (2) years of release as described in the payment plan presented by the defendant.

**DNA Testing.** The defendant shall provide a blood sample before being released from custody in accordance with Section 19.2-310.2 of the Code of Virginia of 1950, as amended.

The Court certifies that at all times during the trial of this case the defendant and his attorney were personally present. Unless otherwise receiving credit, the defendant shall be given credit for the time spent in custody awaiting trial, pursuant to Section 53.1-187 of the Code of Virginia of 1950, as amended.

**SENTENCING SUMMARY:**

TOTAL SENTENCE IMPOSED: 22 years & 12 months
TOTAL SENTENCE SUSPENDED: 0 years

S/WILLIAM C. ANDREWS, III
JUDGE

CLERK:mlw

## APPENDIX E

**Sixth Amendment to the Constitution of the United States of America**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

# APPENDIX F

## Fourteenth Amendment to the Constitution of the United States of America

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.